No. 16,270

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR HAROLD TEAGUE,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

Brief for Appellant Edgar Harold Teague

Appeal from the United States District Court for the Northern District of California, Southern Division

Honorable LOUIS E. GOODMAN, Judge

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STATEMENT OF JURISDICTION

On July 31, 1958, defendant Edgar Harold Teague was indicted by a grand jury of the U. S. District Court for the Northern District of California. The grand jury charged a violation of 18 U.S.C. § 659 (1952) *Theft from a foreign shipment* (Record 3). Upon trial the defendant was found guilty and the court imposed judgment on October 15, 1958. Defendant filed a notice of appeal on the 15th of October, 1958, (Record 7-8), and this Court has jurisdiction of that appeal under 28 U.S.C. § 1291 (1952).

STATEMENT OF THE CASE

This is an appeal from a sentence of a $1000 fine, a thirty-day prison term, and eleven months probation, imposed upon the defendant after a jury found him guilty of violating 18 U.S.C. § 659 (1952). The government's case, simply stated, was that Teague stole five coils of copper wire from Pier 50 in San Francisco, while the wire was being shipped from that city to Kobe, Japan.

At the trial it was undisputed that, early in 1957, Federated Metals Company of San Francisco sold some coils of used copper wire to a broker in New York (Record 40). The broker in turn sold the wire to the Tatsuta Industrial Company in Japan (Record 80). On March 6th of 1957, Federated Metals sent the coils by trucker to Pier 50 of the American President Lines in San Francisco. The coils were counted on arrival, and they were then stowed at the end of the pier (Record 60-61, 70-71). The wire was subsequently loaded aboard the *S.S. President Taylor,* (Record 171), and on the 9th of March the vessel sailed for Japan. She reached Yokohama without touching any intermediate port, and then proceeded to Kobe where the shipment of copper wire was unloaded (Record 101, 104-05).

The defendant Teague testified as follows: He was a painter leaderman employed by American President Lines; and after work on the night of March 6, 1957, he drove home alone via Berry Street in San Francisco. At the intersection of Berry and the Embarcadero he saw five coils of wire which were lying in the roadway. He took the wire and put it in his car, with the possible intention of selling it if it should prove to be worth anything. When he found the wire there was a tag on it marked: "FH 3916 Kobe 174," but it carried no other marks of identification or ownership. Teague denied that he stole this wire from Pier 50 or, indeed, from any other place (Record 238-41).

James Daniels, on orders from his stepfather Teague, subsequently drove Teague's car to the Richmond Iron and Metal Company to price the wire (Record 137-40). While he was getting it priced, a suspicious policeman, who decided that Daniels had no business owning such a commodity, impounded the wire. These are the coils that now appear as Plaintiff's Exhibit 2 (Record 129-34).

It was not disputed that Teague was working near Pier 50 on the night of March 6th and that his car, parked with several others, was close to the place where the shipment for Kobe was stored (Record 145-47).

The government did not attempt to dispute the fact that no shortage had been claimed by the ultimate consignee in Japan, or anyone else, (Record 53, 160-61), but relied for its proof of a shortage upon the finding of the tag, the similarity of the wire, and various counts and weighings of the coils. Employees of Federated Metals testified that 186 coils were sent to Pier 50, and that shipping tags were attached to each of the coils (Record 41, 61). Testimony of a clerk showed that one of the tags bore the notation "FH 3916 Kobe 174", and that this tag was similar in appearance to that found in the five coils that came into Teague's possession (Record 60). An employee of the Pacific Maritime Association testified that the 186 coils arrived at Pier 50, (Record 72), and a shipping clerk testified that he had checked 186 coils aboard the *S.S. President Taylor* (Record 174). This shipping clerk said that, while he had not made an exact count, he had found no shortage (Record 179-80). The captain of the *S.S. President Taylor* then testified that the shipment had been counted at two different ports in Japan. A count in Yokohama showed a total of 181, but a subsequent check in Kobe showed a total of 186 coils (Record 103, 111-13). This testimony was supported by a

cargo boat note (Defendant's Exhibit F), showing that 186 coils were checked off the *S.S. President Taylor* in Kobe.

The evidence also showed variations in the weights of the coils obtained on different occasions. The coils found in Teague's car weighed 460 pounds when weighed by a public weighmaster (Record 212). But, according to the evidence of the government, the police weighed the five coils and the weight was 531 pounds (Record 35). A shipping clerk of Federated Metals testified that the total shipment weighed 22,000 pounds before being sent to Pier 50 (Record 62). But the only evidence offered of the weight upon arrival in Japan was a Japanese weighmaster's certificate, and the weight shown on this certificate was 21,501 pounds (Record 122).

The reception of this paper in evidence is the first of the two errors assigned on this appeal. The second question is whether the government presented sufficient proof of an actual theft—a corpus delicti—to take the case to the jury. Both these questions are raised by the taking of this appeal.

SPECIFICATION OF ERRORS

1. The Admission in Evidence of the Purported Japanese Weighmaster's Certificate.

This four-page typewritten document is Plaintiff's Exhibit 8. It bears the title: Nippon Kaiji Kentei Kyokai, Japanese Marine Surveyors and Sworn Measurers Assoc. Licensed by Japanese Gov't. It contains a purported record of the arrival and weighing at the Hyogo Pier, Kobe, of 186 coils of copper scrap from the *S.S. President Toylor* [sic] on March 24th, 1957. In addition there is a listing of the weight, in kilograms and pounds, of the total shipment and the individual coils. The document is supposedly signed by the manager of the Kobe branch of Nippon Kaiji Kentei Kyokai.

The document was one of a number included in defendant's Exhibit A for identification, but the defendant made no use of it. It was offered in evidence by the U. S. Attorney while Captain Johnson, the master of the *S.S. President Taylor* was on the stand. The record shows the following exchange:

> "Mr. Petrie: I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?
>
> Mr. Roos: We object to it, your Honor, as incompetent, irrelevant and immaterial, and hearsay." (Record 117).

After some discussion, but no further testimony, the court stated that the certificate was admitted, (Record 119), and the defense objected as follows:

> "Mr. Roos: Objected to as incompetent, irrelevant and immaterial, and hearsay, and not a business record of American President Lines, no opportunity, no foundation laid whatsoever to show that it was accurate." (Record 119-20).

The court then said that on that basis he would strike Defendant's Exhibit F (previously admitted in evidence without objection and by stipulations (Record 115-117)), and the following exchange took place:

> "The Court: Do you want your record to remain?
>
> Mr. Roos: The captain identified my record, your Honor. He hasn't identified this.
>
> The Court: All he did was to say that that was the record [the cargo boat note—Defendant's Exhibit F] * * * furnished to him by the Japanese checkers.
>
> Mr. Roos: But he identified it. He hasn't identified the weight certificate." (Record 120).

2. The Denial of Plaintiff's Motion for Acquittal Under Rule 29, Made at the Close of the Government's Case, Renewed After the Defendant's Case and Again After the Jury Verdict.

The defendant's motion for judgment of acquittal following the Government's case was denied (Record 205). A similar motion, made after the defendant's case, was similarly denied (Record 266). The motion was made again after the jury's verdict and once more denied (Record 294).

SUMMARY OF ARGUMENT

Before it could obtain a conviction, the government was required to prove that some wire was stolen and that Teague was the thief. The evidence against him can be put into three catagories: Possession of similar wire and a shipping tag, circumstantial evidence of theft via opportunity, and evidence of a shortage in the shipment. The government was not able to offer any evidence that the consignee had complained of a shortage and, for proof that there was in fact a loss, fell back on evidence of discrepancies in weights and counts. The key piece of evidence offered by the government on this issue was a four-page document purportedly prepared by a Japanese weighing firm. This paper was clearly hearsay and inadmissible unless brought under some exception to that rule. This four-page document received in evidence as Plaintiff's Exhibit 8 was *never even identified*, let alone established as within the business record exception. In fact, the paper was introduced during the testimony of an American President Lines ship's captain who said he had *never seen it before* in his life.

Once it was admitted in evidence, the government made full use of the paper. Much was made of it in the argument to the jury and it went to the jury room, so there is little doubt that the jury considered it in their deliberations.

Since the use of the paper was clearly prejudicial and it was erroneously admitted, the trial court must be reversed.

If the argument that the paper was improperly admitted is accepted, the remaining evidence fails to sustain the conviction. The government was required to prove the loss before it could obtain a conviction; and this, as any other element of its case, had to be proved beyond a reasonable doubt.

The test to be applied was: *Must reasonable men, as a matter of law, agree that a hypothesis that the full shipment arrived in Kobe* could reasonably *be drawn from the evidence?*

If the answer was "Yes" the motion for acquittal should have been granted. The government stipulated that as many coils arrived in Kobe as left San Francisco. On its face this evidence would seem to make inevitable the conclusion that the coils that came into Teague's hands came from some other source than the Kobe shipment. The government suggested that the jury might infer that there had been a criminal conspiracy resulting in some extra coils and, indeed, some such inference was essential to its case. But no evidence was introduced showing that this conspiracy had in fact happened. The defendant submits that to allow the jury to engage in such extravagant hypothesis, on such slim facts, was beyond what is allowable in a criminal case.

ARGUMENT

1. The Trial Court Erred in Admitting in Evidence a Purported Certificate of a Japanese Weighmaster.

A. THE PAPER WAS NEITHER IDENTIFIED NOR AUTHENTICATED.

The crime charged against Teague was that he stole some coils of copper wire which were being sent from San Francisco to Kobe, Japan. Teague did not deny that five

coils of wire were found in his car by the Richmond police, and that he came by the wire without the consent of its owner. He testified, under oath, that he found the wire lying on a highway in the dockside area of San Francisco. The contrary theory of the government was that he stole it from an American President Lines pier, where it was being held for shipment on the *S.S. President Taylor*. Whatever may be thought of Teague's morality in light of his own testimony, he was not indicted for misappropriating five coils of wire someone had left lying in a San Francisco street. He was indicted for theft from a wharf of wire that was part of a foreign shipment (Record 3). Whatever possible quarrel the State of California may have with Teague, the United States had to prove that he stole from a wharf part of a shipment moving in foreign commerce.

Now, if the jurors had believed Teague's testimony about where he found the wire, they could have decided it came from the Kobe shipment, and yet still have found him not guilty. They could have believed that someone else took the coils from the dock and that Teague's action in picking up the wire off a public highway did not show the kind of intent that makes a larceny. Unfortunately for Teague he could offer no witness to corroborate his testimony about finding the wire. On the other hand, nor could the government offer any direct evidence to show that Teague took the wire from the dock. The government offered circumstantial evidence on this issue; but all it showed was that Teague, among many others, had the opportunity to take some wire from the particular shipment that went to Japan.

Since the jury convicted Teague they must, presumably, have disbelieved his testimony that he found the wire. But they must also have believed that the coils were part of the San Francisco to Kobe shipment. The trial judge so instructed them:

> "The Government must also prove that the coils were part of * * * this alleged foreign shipment. And you must also find * * * whether or not the Government has sustained its burden of proving that these coils were a part of the foreign shipment." (Record 285-86).

If the government had failed to offer sufficient evidence to support its assertion that the coils found in Teague's car were from the Kobe shipment, then the trial court would have necessarily granted defendant's motion for acquittal. So the prosecution set about proving a loss from the shipment.

As it happened, the buyers of the shipment of wire made no complaint of any loss, and the government's proof of such a loss was based upon such items as the presence of the shipping tag, the similarity of the coils, and various weighings and countings of the shipment to Japan. Logically enough, the government asked the jurors to compare the weight of the shipment at its origin in San Francisco with its weight at its destination at Kobe. In addition, the government asked the jury to compare the number of coils in the shipment at San Francisco with the number of coils supposedly in the shipment at Yokohama, an intermediate port of call for the *S.S. President Taylor*. The government showed, by the testimony of the purchasing agent of Federated Metals, that 186 coils of wire were in the Kobe shipment when it was trucked to the American President Lines dock (Record 41). It also showed by the testimony of the master of the *S.S. President Taylor* that he, the mate, and a checker, counted 181 coils in the shipment when the vessel reached Yokohama (Record 103). However, the defense was able to show by the same witness that when the ship reached Kobe there were still 186 coils aboard (Record 112-13). This was done by the testimony of the master, by the "Dear

Dunc" letter written by him, (Defendant's Exhibit E), and by the introduction of a cargo boat note, Defendant's Exhibit F, a business record of the *S.S. President Taylor* (Record 117).

At this point in the trial the government attempted to show how there still could have been a theft in San Francisco by introducing evidence of the weight of the shipment when it reached Kobe. The theory of the government, as later expounded in argument to the jury, was that someone had made little coils out of big ones. If this were true, of course, the weight of the shipment in Kobe would be less than when weighed in San Francisco. Previous testimony had shown that the weight in San Francisco was 22,000 pounds (Record 41). So by this time the crucial question in the jurors' minds must have been: *What was the weight in Kobe?*

At this critical stage in the trial, Captain Johnson, the master of the *S.S. President Taylor*, was still on the stand. The U. S. Attorney, Mr. Petrie, asked the captain if he could identify a four-page document which was handed to him (Record 117). This paper was what is now Plaintiff's Exhibit 8, the admission of which in evidence is one of the subjects of this appeal. The only witness who testified about the document was Captain Johnson, and he was questioned as follows:

> "Mr. Petrie: I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?"

At this point there was an objection, but the paper was admitted without any testimony. Cross examination followed:

"Mr. Roos: Captain, did you ever see this weight certificate before it was shown to you in court here this morning, Plaintiff's Exhibit No. 8, a purported certificate of weight and measurement?

Capt. Johnson: *I did not.* I normally don't see those records." (Emphasis added). (Record 122).

So the document remained unidentified. It would appear to be unnecessary to labor the point that the failure to identify the document left it "nothing but a nothing." Its admission in evidence was therefore clearly erroneous. *Summers v. McDermott,* 138 F.2d 338, 339 (3d Cir. 1943); *International Aircraft Trading Co. v. United States,* 109 Ct. Cl. 435, 75 F. Supp. 261 (1947) (alternative holding); 7 Wigmore, Evidence § 2130 (3d ed. 1940).

In addition, if the document was to be admissible the hearsay objection had to be overcome. Evidently the "business record" exception was in the mind of the trial court. In the federal courts this exception is statutory and the relevant words are:

> *"Record made in regular course of business* * * * In any court of the United States * * * any writing * * * made as a * * * record of any act * * * shall be admissible as evidence of such act * * * if made in the regular course of any business, and if it was in the regular course of such business to make such * * * record * * *" Business Records Act. 28 U.S.C. § 1732 (1952).

It has been said that the sufficiency of the foundation for a document is a matter of discretion for the trial judge, and that he will only be reversed if guilty of abuse of this discretion. *Arena v. United States,* 226 F.2d 227, 235 (9th Cir. 1955), *cert. denied,* 350 U.S. 954 (1956). But it has never been suggested that a document can be admitted without *any* evidence to identify it.

The Supreme Court has not had occasion to rule on the precise issue involved in this appeal, but a similar question has been considered in this circuit. The question arose in a civil anti-trust suit for damages caused by a conspiracy to refuse to supply petroleum products. At the trial numerous letters, telegrams, memoranda, and reports were admitted in evidence. Some of these papers were handwritten, some typewritten, and some printed. Although there was no question that the papers came from the defendant's files, the defense objected that no foundation had been laid. On appeal to this Court the case was reversed and remanded on the grounds that many of the papers were not made in the regular course of business, it was not in the regular course of business to make them, and some were mere opinions. *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958).

It is impossible to determine the theory, if any there was, upon which the trial judge admitted the alleged Japanese weight certificate in evidence. The record, while Captain Johnson was on the stand, reads as follows:

> "Q. [Mr. Petrie] I notice among the papers that are Defendant's Exhibit A for identification a copy of a certificate of measurement and/or weight. Can you identify that document for us?
>
> Mr. Roos: We object to it, your Honor, as incompetent, irrelevant and immaterial, and hearsay * * *
>
> Mr. Petrie: * * * This is a business record just as the boat note or anything else.
>
> * * * * * * *
>
> Mr. Petrie: This is the certificate of the Japanese weigher at Kobe, your Honor, which confirms that 186 coils were unloaded.
>
> * * * * * * *
>
> The Court: This is also a part of the—
>
> Mr. Petrie: Company's records.

The Court: —company's records. I have admitted, at your request, the cargo boat note by the checkers. I will admit the —

Mr. Roos: The cargo boat note, if your Honor please, was a ship's record.

The Court: No, it wasn't. [*But see Record 114-15*] I didn't admit it as a ship's record: I admitted it as a record of the Japanese checkers who furnished it to the boat. This is another one that they furnished to the boat.

Mr. Roos: That is not furnished to the boat, your Honor. It was not furnished until this investigation commenced.

Mr. Petrie: That is not true. [*But see* affidavit of Bernard Petrie, Assistant U. S. Attorney, filed with this court in opposition to Defendant's application for bail pending appeal wherein Mr. Petrie swears on page 4 that: "the weight certificates had been sent to American President Lines in San Francisco by an employee in Japan."]

* * * * * * *

Mr. Petrie: The Government offers the certificate of weight in evidence.

The Court: Admitted.

Mr. Roos: Objected to as incompetent, irrelevant and immaterial, and hearsay, and not a business record of American President Lines, no opportunity, no foundation laid whatsoever * * *

* * * * * * *

Mr. Roos: It has never been identified; it is hearsay." (Record 117-21).

Thereafter, Captain Johnson admitted that he had never previously seen the purported certificate of weight (Record 122).

In point of fact the contested paper came to court in the records of the San Francisco office of American President Lines. It was brought to the court by a Mr. Wheeldon in

response to defendant's blanket subpoena. There is not a word of testimony in the record to explain the presence of the certificate in the files of American President Lines. Courts have several times pointed out that the mere presence of documents in a file does not make them admissible under a business records act. As was said in *Standard Oil Company of California v. Moore, supra,* 251 F.2d at 215 n. 34:

> "The existence of a document or its presence in the file of a corporation does not, without more, render it admissible under § 1732."

This holding should be contrasted with that in *Olender v. United States,* 237 F.2d 859 (9th Cir. 1956), *cert. denied,* 352 U.S. 982 (1957). That case was a successful prosecution for income tax evasion where, on appeal, the defendant argued that the admission in evidence of certain shipping memoranda was erroneous. This court rejected the argument, pointing out that the memoranda had been identified by an executive vice-president, and that he testified that the records were made in the usual course of business.

But in Teague's case the government failed to meet the standards declared by this court. There was no evidence offered to show what the paper was, the circumstances of its origin, or how it came to San Francisco. Though the paper may look authentic, its very look of substance must have been to the greater prejudice of the defendant, should it prove to be false. See 3 Wigmore, Evidence 174 (3d ed. 1940).

B. THE ADMISSION OF THE WEIGHT CERTIFICATE SUBSTANTIALLY AFFECTED THE RIGHTS OF DEFENDANT.

If the admission of the weight certificate was error, then the conviction must be reversed unless this Court can say

that the "substantial rights" of the defendant were not affected 28 U.S.C. § 2111 (1952).

The question of what are "substantial rights" in a criminal case has often been before the Supreme Court. Perhaps the most extensive consideration was undertaken in *Kotteakos v. United States*, 328 U.S. 750 (1946). The Court in that case reversed the Second Circuit for holding a variance between indictment and proof to have been error but not reversible error. Mr. Justice Rutledge stated that the question for a court of appeals to decide was not whether without the error the record supported the conviction, but what was the effect on the jury of the thing done wrong. He went on to say:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id* at 764-65.

This, then, is the question to be asked on this appeal: *Can one say "with fair assurance, after pondering all that happened" that the jury was not "substantially swayed" by the weight certificate?*

The disputed evidence in this case was not testimony which might only have a temporary effect; but, instead, consisted of four pages of writing which were taken into the jury room. What was said and done in that juryroom is

hidden behind the general verdict, but there is surely grave doubt that the jury did not look at those four sheets of paper. Moreover, the persuasive effect on a jury of something that can be seen and felt has been pointed out many times. Wigmore strikingly commented on the dangers involved:

> "[A] material object, particularly a writing, when presented as purporting to be of a certain origin, always tends to impress the mind unconsciously, upon the bare sight of it, with the verity of its purport. Does it purport to be a contract signed by A & B? We immediately assume it to be such; though it may be the merest forgery. Does it purport to be a picture of the place of murder? We look at it with an interest based on the unconscious assumption that it *is* that house. In short, we unwittingly give the document the credit of speaking for itself; though no human being has yet spoken for it. Now this tendency has be be rigorously repressed * * *" 3 Wigmore, Evidence 174 (3d ed. 1940).

Moreover the particular writing involved was climactically introduced at the end of the most intensely fought legal battle of the trial. The argument over its admission occupies seven pages of the record and cannot have failed to impress the jury with the vital importance attached to the paper by the government.

This importance was emphasized by the trial judge who commented to the jury, (Record 121), that the weighmaster's certificate was "equally entitled to the consideration of the jury" as was Defendant's Exhibit F, the cargo boat note, which showed the receipt by the checkers of 186 coils of copper scrap. The court stated (incorrectly), that both records were made by the same Japanese company. This importance the U. S. Attorney emphasized by his argu-

ment to the jury. He stated how the government viewed the problem of the origin of Teague's coils:

> "Now we come to the crucial question in the case: Were the five coils of copper wire part of this foreign shipment?" (Record 271-72)

In making his argument on this self-designated "crucial issue", the U. S. Attorney adopted the theory that someone engaged in a criminal conspiracy to cover up for the defendant.[1] Some such theory was necessary in the face of uncon-

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1. The atmosphere in which this trial was conducted can be gleaned from a single incident, though there were many. In a discussion without the presence of the jury the trial judge stated that he would not permit the U. S. Attorney to make his "little coils out of big ones" conspiracy argument to the jury. Mr. Petrie had asked for a stipulation that the Defendant belonged to the same union as the seaman aboard the President Taylor. The court indicated that this fact was irrelevant. The following exchange occurred:

> "The Court: What you want is to establish the fact that the defendant belongs to a union which also includes seamen in it?
>
> Mr. Petrie: As making it more likely that someone aboard the President Taylor would help the defendant out by covering for him and converting five of these coils into ten between Yokohama and Kobe.
>
> * * * * * * *
>
> Mr. Petrie: I have got two thoughts about that, your Honor, to show it is relevant; (1) it would make it more likely that the defendant would be better known to the people aboard the President Taylor and that they would know him so that he would have somebody to contact; secondly, it would make it more likely that some seaman aboard the President Taylor would be willing to risk his own interest to protect the defendant.
>
> The Court: Mr. Petrie, I think I would hold against you on that. *I think that is in the realm of speculation. I don't think you would be entitled to make that argument.*
>
> Mr. Petrie: I will abide by your decision on it, your Honor. That was the thought that I had.
>
> The Court: *That would be in the realm of speculation and conjecture and would not, I think, fall reasonably within the area of circumstantial evidence.*
>
> Mr. Petrie: I will not pursue it." (Record 263-64)

Then in his argument to the jury Mr. Petrie proceeded to make exactly this argument. Defendant's counsel naturally objected and

tradicted testimony that 186 coils left San Francisco and 186 coils arrived in Kobe. So he continued:

> "We call [sic] in addition confirmation of that. The weight, according to Mr. Calkin's weighing at Federated Metals, was 22,000 pounds. *You can look* at Government's Exhibit 8. *That is the certificate of the Japanese weighmaster at Kobe.* It carried a weight of 21,501 pounds, a differential of about 500 pounds." (Emphasis supplied.), (Record 274).

It is, of course, true that the Japanese weight certificate was not the only evidence connecting the five coils found in Teague's car with the shipment to Japan. The other items

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was slapped down by the court in the presence of the jury in no uncertain terms.

> [Mr. Petrie:] "Then we have the strange occurrence that by the time the boat reaches Kobe three days later, there are 186 coils. You will recall that the coils are of irregular size. Now, if you are satisfied, as I submit you must be, that only 181 coils left San Francisco—if you are satisfied as to that, then the only explanation for their still being 186 coils at Kobe after the count of 181 in Yokohama *is that someone aboard that ship made ten coils out of five*—some seaman, some friend of the defendant's made ten coils out of five—*to cover up for the defendant* and to protect him.
>
> Mr. Roos: If your Honor please, I hate to interrupt counsel's argument, but *is it proper for him to ask the jury to indulge in speculation and surmise?*
>
> The Court: I don't think there is any reason for the interruption.
>
> Mr. Roos: I am sorry, your Honor.
>
> The Court: Counsel can make arguments from the evidence just as you can.
>
> Mr. Roos: All right.
>
> Mr. Petrie: You knew, ladies and gentlemen, that 186 coils were shipped by Federated. Mr. Calkins told you that. You know that 186 coils and no more were received at the dock at American President Lines, because Delehanty, the checker, told you that he checked each of the coils off; is that so? That's why I say to you if you are satisfied that these five coils came from that shipment and that they never left San Francisco, then the only explanation for there being 186 coils at Kobe is that *someone aboard the President Taylor made ten coils out of five to cover up for this defendant.*" (Record 273-74) (Emphasis supplied).

of evidence used by the U. S. Attorney in his argument to the jury were:

1. The testimony that Teague's coils were very similar to those in the shipment.
2. The shipping tag found in the coils.
3. The count of 181 coils at Yokohama.

However, the three items above could well have failed to convince a jury beyond a reasonable doubt in the face of the 186 coil count at Kobe. To overcome this possibility the final piece of evidence from which the government argued was the weight certificate. Without this the jury might have found for the defendant's innocence, and it may well have been the final weight that tilted the scales against Teague.

But, in any event, the test as formulated by the Supreme Court is not whether the remaining evidence will support the charge. See *Kotteakos v. United States, supra,* 328 U.S. at 765. And the mere fact that the erroneously admitted evidence was cumulative to other evidence is not sufficient to make the error harmless. *Krulewitch v. United States,* 336 U.S. 440, 444-45 (1949). This court's duty is not to weigh the remaining evidence to see whether it supports the judgment, but to weigh the effect of the error, if such it was, on the minds of the jury. *Kotteakos v. United States, supra* at 764; *Prevost v. United States,* 149 F.2d 747 (9th Cir. 1945); *c.f. United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 239, 242 (1940). See also dissent of Frank, J. in *United States v. Antonelli Fireworks Co.,* 155 F.2d 631, 647-53 (2nd Cir.), *cert. denied,* 329 U.S. 742 (1946). In the present case there can be no doubt as to the substantial effect of the weight certificate—but if there be *only a reasonable question* as to whether it substantially affected the result that doubt would, under the Supreme Court's test, require reversal.

If the jurors followed the suggestion of the U. S. Attorney to look at this exhibit (Record 274), and it seems likely

that they would, then there can be little doubt that its effect on their minds was substantial. This being so, if the paper was erroneously admitted, the conviction must be reversed. Apart from the effect upon the minds of the jury on the issue of shortage or no shortage, the defendant's case must have been damaged in other ways. As pointed out before, the government not only had to show that Teague's coils came from the Kobe shipment, but that he stole them from that shipment. Teague's position was that the five coils that came into his possession did not come from the Kobe shipment and, in any event, he found the coils and did not steal them. But once having found against him on the issue of the origin of the coils with the aid of improperly admitted evidence, the jury might easily have been swayed against Teague on the issue of how he came by the coils. Finally, in some ways a juror's attitude toward a defendant is influenced by the trial judge's attitude towards defendant's counsel. The loss of the argument over the admission of the weight certificate must have damaged, to some unascertainable extent, the defendant's power to convince a jury of his innocence.

Whether or not the erroneous admission into evidence of a particular document is prejudicial generally entails an examination of the entire transcript to determine the climate and atmosphere of a trial. Prejudice is frequently cumulative. If a trial judge has been scrupulously fair to a defendant, an appellate court may conclude that a single, albeit serious, error in the admission or rejection of evidence was not prejudicial. Such was not the case here. (See *United States v. Ah Kee Eng*, 241 F.2d 157 at 161 (2nd Cir. 1957) concerning similar conduct by a trial court). To detail every instance wherein the trial court departed from neutrality to assist the prosecution would unduly lengthen this brief. Summary references to the record must suffice:

1. In numerous instances the trial court unduly restricted cross-examination by defendant's counsel when he sought to have documents identified and to delve into such vital matters as the number of coils in the shipment, the initial weight of the shipment out of Federated Metals, and the number of coils loaded and checked aboard the vessel (E.g., Record 55-58, 63, 65, 67-69, 107).

2. Defendant's counsel was not permitted to question witnesses concerning their knowledge of documents unless the witnesses had personally prepared the document. (E.g., Record 55-56, 58, 67-68, 74, 80, 86-89).

3. The trial judge made the amazing statement to the jury that the U. S. Attorney had no duty to bring out the whole truth but had only the duty to secure a conviction. (Record 75-76).

4. The trial judge permitted the U. S. Attorney to read to the jury from documents during the course of the trial but would not permit defendant's counsel to do so (Compare Record 110-111 with 121-122).

5. The trial judge repeatedly sustained objections to questions of defendant's counsel when in fact no objection had been made by the U. S. Attorney. (Record 55, 56, 106-107, 162).

6. Evidence of custom and practice was admitted when offered by the prosecution but excluded when offered by the defense. (Record 68, 89, 166).

7. Disparaging comments on evidence presented by the defense and on the defendant's theory of the case were made at frequent intervals, (Record 56, 57, 63, 76, 107, 108, 112-113, 120, 121, 212), always in the presence of the jury.

Any doubt as to the existence of animosity toward the defense was removed by the trial court's remarks during argument on the motion for acquittal, (Record 201, 203), by the ill-concealed attempt to secure a confession with proba-

tion as the bait, (Record 295-299), and by the in-chambers reception of adverse information concerning the defendant from "an important labor leader." (Record 295-296). This animosity reached its culmination in the erroneous denial of bail on appeal, (Record 299-300), which was promptly corrected by this Court.

In conclusion, the erroneous admission of the purported Japanese weight certificate must have exercised substantial influence upon the verdict of the jury. The weight shortage theory replaced the starting prosecution theory of a coil count shortage. The theory of a coil count shortage was abandoned by stipulation upon becoming untenable through introduction of the "Dear Dunc" letter and the cargo boat note. The Japanese certificate is, on its face, an impressive document which could not but impress the average juror. Its effect upon the jury must be weighed with the numerous actions of the trial court whose cumulative and total effect cannot be denied.

II. The Trial Court Erred in Failing to Grant Defendant's Motion for Acquittal Since, Without the Weight Certificate, the Government Failed to Prove a Corpus Delicti.

It is beyond dispute that, before a man may be convicted of a particular crime, the crime itself must have been committed by someone. In the case of larceny this self-evident requirement is met by proof of the two elements of a corpus delicti:

(1) Some property was lost by an owner; and

(2) The loss was caused by a felonious taking. *Vaughn v. United States*, 272 Fed. 451, 452 (9th Cir. 1921); *People v. Siderius*, 29 Cal. App. 2d 361, 366, 84 P.2d 545, 549 (1938).

The loss by a felonious taking of *some coils* from the Kobe shipment was therefore a necessary element of the government's case against the defendant. And all necessary elements had to be proved beyond a reasonable doubt. *Davis*

v. United States, 160 U.S. 469, 493 (1895); *Karn v. United States,* 158 F.2d 568, 572 (9th Cir. 1946). If the evidence brought before the jury was insufficient on that issue, then the defendant's motion for a judgment of acquittal should have been granted. The controlling rule was:

> *Rule 29. Motion for acquittal. (a) Motion for judgment of acquittal* * * * The court on motion of a defendant * * * shall order the entry of judgment of acquittal of one or more offenses * * * after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

The circumstantial evidence, viewed most favorably to the prosecution, on the question of whether there was a felonious taking from the shipment may be summarized as follows:

1. 186 coils were counted before being shipped from Federated Metals for Pier 50.
2. 186 coils were counted on arrival at Pier 50.
3. Captain Johnson, his first mate, and a Japanese checker counted 181 coils at Yokohama.
4. Teague admitted coming into possession of five coils, with a tag in the coils apparently identical to a tag attached to a coil of the Kobe shipment.
5. The coils that came into Teague's possession were very similar to those shipped to Kobe.
6. *It was stipulated* that 186 coils arrived at Kobe (Record 115-116).

If the state of the evidence is such that no reasonable jury could find beyond a reasonable doubt that the defendant is guilty of the crime charged, (or, as here, that the crime had, in fact been committed) then a motion for acquittal must be granted. *Cooper v. United States,* 218 F.2d 39 (D.C. Cir. 1954); *Curley v. United States,* 160 F.2d 229 (D.C. Cir.), *cert. denied,* 331 U.S. 837 (1947).

From the circumstantial evidence of the shipping tags, the 186 count in San Francisco, and the 181 count in Yokohama standing alone, it could be inferred that there was a felonious taking; *but* from the arrival of 186 coils at Kobe (a stipulated fact) such an inference becomes untenable. We are not here dealing with the weighing of evidence, nor the balancing of conflicting inferences to determine whether an ultimate fact in a civil case has been proved by a preponderance of the evidence. The question here is whether there is sufficient evidence, *as a matter of law,* to permit a reasonable jury to find, *beyond a reasonable doubt,* that the full shipment did not arrive at Kobe or, stated another way, that the 5 coils found in the defendant's automobile were a part of the San Francisco to Kobe shipment. Again, we are not here concerned with the finding of a fact based upon a preponderance of the evidence but with whether or not the evidence is sufficient to justify, *as a matter of law,* the finding of an ultimate fact *beyond a reasonable doubt.* As stated by this court in *Remmer v. United States,* 205 F.2d 277, 287-88 (9th Cir. 1953), *vacated on other grounds,* 347 U.S. 227 (1954), a motion for judgment of acquittal is properly denied "if reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt * * *." But here "reasonable minds" could not so find. Here "there is no evidence upon which a reasonable mind might fairly conclude [proof of a corpus delicti] beyond a reasonable doubt * * *" *Cooper v. United States, supra,* 218 F2d at 41.

It is not unlikely that three men trying to count coils in the crowded hold of a ship in Yokohama would fail to find five of them. It is beyond the realms of possibility that a checker in Kobe could count 186 when there were only 181. To escape the logic of this the government suggested that someone made little coils out of big ones. But there is no evidence in the record to show that this event actually took place. The government had the burden of producing evi-

dence to prove the corpus delicti and to withstand the motion for acquittal; and surely that burden was not satisfied by such imaginative resourcefulness as creating accessories after-the-fact out of thin air. The inference that someone made some extra coils is essential to the government's case for, unless the jurors believed this, they could not have found there was a loss and so a crime. Such a prodigious inferential leap is, as the trial judge once ruled (Record 263-264), beyond the area of the legally permissible inference. (See footnote 1, p. 17, *supra.*) So the defendant submits that, as a matter of law, no reasonable mind could exclude the reasonable possibility that there was no loss from the Kobe shipment and no corpus delicti. Stated another way, no reasonable mind could be satisfied, beyond a reasonable doubt, that a theft from the Kobe shipment occurred. This being so, the motion for acquittal should have been granted.

CONCLUSION

The admission of the unidentified and unauthenticated weight certificate was erroneous and prejudicial.

Without the weight certificate the evidence was legally insufficient to prove a loss and thus a corpus delicti. Therefore, the motion for a judgment of acquittal should have been granted.

The judgment of the District Court must be reversed and a judgment of acquittal entered by this Court.

Respectfully submitted,

April 8, 1959

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EXHIBITS

		Iden. Record Page	Evid. Record Page
For the Plaintiff:			
1.	Map of pier area	32	
3.	Shipping tag from wire	38	194
6.	Dock receipt, American President Lines	66	91
7.	A. Bill of lading (Photostat)	81	90
	B. Dock receipt (Photostat)	81	90
8.	Certificate of weight		119
9.	Clerk's hatch report	171	181
For the Defendant:			
A.	American President Lines records	27	
E.	Letter, March 27, 1957, "Carl" to "Dunc"	116	261
F.	Cargo boat note		117
K.	Yellow dock receipt		179
L.	Copy of weight certificate	211	259